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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/705,657	11/10/2003	Jeremy Thaler	10770013010202	6140
37211	7590	06/14/2007	EXAMINER	
BASCH & NICKERSON LLP			PRATT, HELEN F	
1777 PENFIELD ROAD			ART UNIT	PAPER NUMBER
PENFIELD, NY 14526			1761	
MAIL DATE		DELIVERY MODE		
06/14/2007		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/705,657	THALER ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 29 May 2007.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-24 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)
 Paper No(s)/Mail Date _____.
- 4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application
- 6) Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by American Classic (label from jar only).

The American Classic label discloses a peanut butter made from organically grown dry roasted blanched peanuts, organic palm oil, sugar and salt as in claims 1 and 2, 5, 6, 7, 8. The particular amounts of oil are seen to have been disclosed in the composition, which must contain certain amounts of oil in order to be called a peanut butter.

The limitations of claim 3 are seen to have been met as to the melting point as the claimed palm oil has been shown.

The limitations as to claim 4 are process limitations, which are not given weight in a composition claim.

Claim 1 further requires that no free oil on the surface and storage for 60 days. However, as the composition has been shown, it is seen that no oil is on the surface and the storage is as claimed.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 10, 12-18, 20-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lui et al. (6,982,101) in view of American Classic (Label).

Liu discloses a sweetened nut butter spread made by grinding nuts in the presence of oil at a temperature of from ambient to 165 F (abstract and col. 2, lines 50-70). Cooling is a given since peanut butter is not kept in a heated state. The palm oil is used in amounts from 1-15%, preferably 2-12% (col. 3, lines 5-10, 20-25). Claims 12, 15, and 21 differs from the reference in the use of organically grown peanuts and organic palm oil. However, American Classic discloses that it is known to use organically grown peanuts. Also, nothing new is seen in using organically grown peanuts as opposed to commercially grown peanuts, absent a showing of unexpected

results in using peanuts which are grown without the use of chemical fertilizers. Claim 1 further requires that no free oil on the surface and storage for 60 days. However, as the composition has been shown, it is seen that no oil is on the surface and the storage is as claimed. Therefore, it would have been obvious to use known organically grown peanuts and to make a product which has no free oil on the surface of the peanut butter for 60 days.

Nothing new is seen in adding the oil during the grinding step into the mill, as in claim 14 as this has to have been done in order for the peanuts to have been ground (abstract). Therefore, it would have been obvious to dispense oil into the apparatus which is grinding the peanuts.

Claims 14 and 15 further require preheating the oil before dispensing the oil into the mill at particular temperatures and claim 16 requires roasting the peanuts before grinding. The reference is silent as to heating the oil. However, nothing new is seen in heating the oil before adding it since the peanut paste and oil were maintained at a temperature above 133 F. absent a showing of unexpected results using the claimed temperatures. Certainly the nuts are roasted before grinding (col. 2, lines 41-50). Therefore, it would have been obvious to dispense oil into a mill at particular temperatures and to grind the nuts prior to roasting.

Lui discloses roasting nuts at from 270 to 370 (col. 2, lines 41-50). Therefore, it would have been obvious to roast at known temperatures.

Removing the skins is disclosed in col. 2, lines 44-50 as in claim 18.

Nothing new is seen as in claim 20 of collecting and pumping the peanut mixture to a heat exchanger and filling station, which is routinely done in the art. Therefore, it would have been obvious to collect, and pump the mixture in order to put it into containers.

Adding salt and sweetener is disclosed in col. 5, lines 40-60, as in claims 22 and 23, and milling to within the claimed range is disclosed in Lui who uses from 10-20 mils, preferably 13 mils.

Claims 9, 11,19 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims, and further in view of Krisinski et al. (4,143,176).

Krisinski et al. disclose that it is known to use particle sizes of from 8-20 microns as in claims 11 and 24 (col. 1, lines 58-70). Also, Krisinski et al. disclose that it was known to make a conventional peanut butter using normal skins and germ in the amounts of 50-60% as in claims 9 and 19 (col. 2, lines 22-41). Therefore, it would have been obvious to grind to a particle size as claimed as shown by Krisinski et al. in the process of the combined references and to add the germ to the composition.

ARGUMENTS

Applicant's arguments filed 5-2-07 have been fully considered but they are not persuasive. Applicant argues that the peanut butter is organic, and that this limitation has not been addressed. However, no patentable distinction is seen at this time between the use of organic peanuts and peanuts grown commercially with chemicals

absent a showing of anything unexpected using organically grown peanuts. Also, as stated in the office action "American Classic" uses organically grown peanuts.

Nothing has been shown that the total fat concentration in the peanut butter of the references is less than 55%. It is known that peanuts in general contain about 51% fat. Nothing has been shown that the composition of Rombauer would have fat separation. The Office does not have the facilities to determine such.

Applicants argue that Rombauer teaches that heating the composition would make it rancid. This of course depends on the temperature and no particular temperature is claimed except that it be maintained in a liquid state. Applicants claims require milling. Rombauers' recipe uses an electric blender and both types of treatment produce heat. No particular degree of heat as said above is claimed to define over the reference.

It is not seen that the reference to Krisinski teaches away from the limitations of claims 9, 11, 19 and 24. Even Rombauer teaches the use of the germ of the peanut. Krisiniski teaches the use of the germ and skin and teaches particle sizes within the claimed range. It is not understood in what manner the references teaches away.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 6-8-07

H. Pratt
HELEN PRATT
PRIMARY EXAMINER